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- ❖ Fighting the Use of Lost Evidence
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- ❖ Waiving Judicial Disqualification
In Problem-Solving Courts

PORTLAND, OR >>> SEE PAGE 3
April 10, 2014 / 5th Annual
Post-Conviction Conference

LAS VEGAS, NV >>> SEE BROCHURE
May 15-18, 2014 / NACDL's
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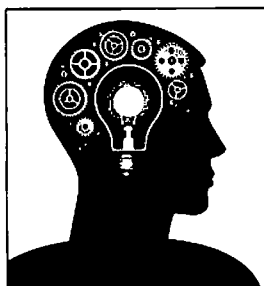
34 A Call to End Prospective Waivers of Judicial Disqualification in Accountability Courts

By Christopher C. Edwards and Jacob B. Vail

Rule 2.11 of the ABA Model Code of Judicial Conduct provides that a judge must disqualify himself or herself in *any* proceeding in which the judge's impartiality might reasonably be questioned. But many accountability courts (problem-solving courts) do not follow this rule. Instead, they require a prospective waiver of judicial disqualification as a condition to admission into accountability court. When an accountability court defendant violates the program conditions, should the same *personally involved* judge preside over the hearings to terminate the defendant from the program and sentence the defendant? What is the effect on the public perception of accountability courts if a defendant has the right to disqualify a judge but fails to do so because of the waiver? The authors propose that a comment be added to Rule 2.11 stating *all* judges are always subject to disqualification unless disqualification is waived based upon known, existing facts.



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44 Intellectual Disability: A Digest of Complex Concepts in *Atkins* Proceedings

By Nancy Haydt

In *Atkins v. Virginia* (2002) the U.S. Supreme Court declared constitutional protection from execution for capital defendants who have intellectual disability. *Atkins* defined intellectual disability by reference to the DSM-IV (1992) and the American Association on Mental Retardation (2002). The AAMR and DSM definitions have been updated and best practices for diagnosis have been recommended. Nancy Haydt reviews the current scientific literature and recent case law in *Atkins* proceedings.

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A Call to End Prospective Waivers of Judicial Disqualification in Accountability Courts

I. Introduction

A. The Proposed Comment

The ABA Model Code of Judicial Conduct (CJC), Rule 2.11: Disqualification, provides: “A judge shall disqualify himself or herself in *any* proceeding in which the judge’s impartiality might reasonably be questioned. . . .”⁷ A seventh comment should be added to that rule:

- [7] A judge serving on therapeutic or problem-solving courts, mental health courts, or drug courts may assume a more interactive role with parties and others than in traditional courts, but impartiality of the judge is essential to the legitimacy of all courts. All judges are always subject to disqualification, unless disqualification is waived based upon known, existing facts.

The proposed comment would preclude accountability courts from requiring a prospective waiver of judicial disqualification as a condition to admission into accountability court. Included in this article are examples of the waiver forms that should be prohibited. The license to innovate in accountability courts does not include license to disregard the processes or substance of the CJC. Innovation in rehabilitation is laudable, but unauthorized innovation in judicial ethics imperils judicial legitimacy and is not authorized by law.⁸ Accountability court judges must be accountable.

B. Accountability Courts Are Fully Subject to the CJC

When the defendant has failed and the prosecutor seeks to terminate the defendant from accountability court, the appearance of impartiality may be compro-

Editor’s Note: In 2009 NACDL released a report titled *America’s Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform*. The report offered recommendations to ensure that the procedures in drug courts comply with constitutional and ethical norms (<http://www.nacdl.org/drugcourts>). In this article, authors Judge Christopher C. Edwards and Jacob B. Vail call attention to another concern involving the practices in drug courts — the use of prospective waivers of judicial disqualification contracts. The authors submitted this manuscript as a proposed comment to ABA Model Code of Judicial Conduct Rule 2.11.

BY CHRISTOPHER C. EDWARDS AND JACOB B. VAIL

mised by the relationship that has developed between the judge and the defendant. One judge revealed:

A judge in a problem-solving court becomes the leader of a team rather than ... dispassionate. ...

... There has also been concern that the judge's intense and personal involvement could raise questions about impartiality. In fact, the effectiveness of the court often depends upon the judge's personal involvement and the use of judicial authority to change the behavior of the litigants.³

The development of a judge-defendant relationship is intended by the design of drug court. Drug court is defined as:

A specially designed criminal court calendar or docket, the purposes of which are to achieve a reduction in recidivism and substance abuse among nonviolent substance abusing offenders and increase the offenders' likelihood of successful habilitation. Interventions include early, continuous and intensive judicially supervised treatment, mandatory periodic drug testing, community supervision, and the use of appropriate sanctions, incentives, and habilitation services.⁴

There is certainly time for the intended judge-defendant relationship to flourish. Participants often spend two years or more in drug court, including monthly or weekly appearances before the judge. By design, accountability courts have broad discretion in their operations and structure.⁵

The drug court judge is asked to fulfill several nontraditional roles at once: treatment-judge, counselor-judge, mentor-judge, and even big-brother-judge.⁶ Drug court "guidelines explain that a drug court judge should issue praise for regular attendance or a period of clean drug tests, offer encouragement, and even award the participants tokens of accomplishment during open court ceremonies for completing particular phases of treatment." Instead of being a detached arbiter, "the drug court judge is sometimes supposed to instill in the participant the fear that big brother is always watching him, ready to pounce upon

each and every infraction, and immediately address it with responses ranging from disparaging remarks to jail time."⁷

Drug courts "require judges to step beyond their traditional independent and objective arbiter roles and develop new expertise."⁸ The judge is part of a nonadversarial "therapeutic team"¹⁰ that includes, "at a minimum, the ... judge, public defender, prosecutor, program coordinator, law enforcement, and treatment provider/substance abuse professional."¹¹ The judge's frequent supervision "communicates to participants — often for the first time — that someone in authority cares about them and is closely watching what they do."¹²

Consequently, the judge's role and judicial ethical norms are works in progress. But, there are no separate canons for disqualification in accountability courts. For example, all drug courts are operated under guidelines promulgated by the National Association of Drug Court Professionals called the Ten Key Components. The Ten Key Components make no reference to disqualification.¹³ All accountability court proceedings, including accountability court termination hearings, are clearly judicial proceedings.¹⁴ The CJC canons aspire to uniformly "state overarching principles of judicial ethics that all judges must observe."¹⁵ Therefore, all of the CJC applies with full force in all accountability courts.¹⁶ "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. ..."¹⁷ But many accountability courts are not following that law. When an accountability court defendant violates the program conditions, should the same personally involved judge preside over the hearings to terminate the defendant from the program and sentence the defendant? Different states and different courts apply a polarized spectrum of approaches from automatic disqualification upon request, to automatic virtual nondisqualification (i.e., the waiver of prospective disqualification).¹⁸

An informal national blog survey showed that about 71 percent of responding courts had the accountability court judge preside over both termination and sentencing absent a motion to disqualify. See discussion *infra* Part II.A. About 2 percent of the responding courts provided that the accountability court judge would preside unless the defendant opted for a new judge to preside over termination and sentencing, and about 19 percent provided for a judge other than the accountability

court judge to preside over termination and sentencing, even absent a motion to disqualify. See combined discussion *infra* Part II.B. Finally, about 8 percent of the responding courts appear to require defendants to prospectively waive their right to disqualify the judge upon entering accountability court. See discussion *infra* Part II.C.

II. The Spectrum of Disqualification in Accountability Courts

A. The Mainstream: Traditional Disqualification

In the mainstream majority, most accountability courts treat judicial disqualification the same as judicial disqualification in traditional courts. Representing the majority rule, two states' high courts recently held that a drug court judge presiding over a subsequent termination hearing or sentencing hearing does not necessarily violate the appearance of impartiality or due process.¹⁹ Instead, these states apply the same objective standard in all courts including accountability courts.²⁰

B. Automatic Disqualification Due to Presumption of a Judge-Defendant Relationship: The Trend

Although only Oklahoma requires automatic judicial disqualification in the event of termination or sentencing of a drug court participant, it appears that nationally perhaps 21 percent of drug courts practice either automatic disqualification or disqualification on demand.²¹ In Oklahoma, a defendant moving for disqualification of a drug court judge is entitled to automatic disqualification if a termination or sentencing hearing is pending because drug court is presumed to have created a relationship between the judge and defendant requiring disqualification. The court in *Alexander v. State*²² acknowledged the axiomatic truth that accountability court judges necessarily must develop a genuine relationship with each defendant to be effective in this nontraditional role. In Oklahoma, "if an application to terminate a drug court participant is filed, and the defendant objects to the Drug Court team judge hearing the matter by filing a [m]otion to [r]ecuse, the defendant's application for recusal should be granted and the motion to remove the defendant from the Drug Court program should be



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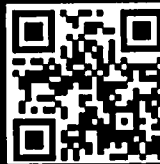
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assigned to another judge for resolution.”²³ All the defendant needs to provide is “facts sufficient to support his claim that the judge assigned to his Drug Court termination proceeding was a member of the defendant’s Drug Court team.”²⁴ If not asserted, the drug court defendant’s right to automatically disqualify the judge is waived as in any other type of case.²⁵

The *Alexander* court reasoned:

[W]e recognize the potential for bias to exist in a situation where a judge, assigned as part of the Drug Court team, is then presented with an application to revoke a participant from Drug Court. Requiring the district court to act as Drug Court team member, evaluator, monitor and final adjudicator in a termination proceeding could compromise the impartiality of a district court judge assigned the responsibility of administering a Drug Court participant’s program.²⁶

For similar reasons, the Tennessee Court of Criminal Appeals recently held that “due process concerns attending a

trial judge’s receipt of ex parte information during the drug court treatment process prohibits the same judge from adjudicating a parole revocation based on the same or related subject matter.”²⁷

C. Automatic Irrecusability: The Use of Prospective Waivers of Disqualification in Accountability Courts

As one commentator noted about the earliest creation of accountability courts, “the judiciary has carved out the authority to act outside of the ... limitations of the law.”²⁸ Accountability court judges admit the “evolving nature of drug courts”²⁹ means “mistakes will be made.”³⁰ Some accountability courts are still making just such a mistake. Specifically, some judges make themselves virtually irrecusable by the use of court-required prospective waiver of disqualification contracts. The use of these waivers appears to prohibit, but certainly at least chills, CJC Rule 2.11 disqualification as a precondition to rationing admission to accountability court.

There are three reasons that judges require prospective waivers of disqualification. First, accountability courts conceptually confuse legally authorized innovation in rehabilitation with unau-

thorized innovation in judicial ethics. The problem is perhaps overlooked due to the effusive enthusiasm for accountability courts addressing obdurate social problems. Second, as accountability courts proliferate,³¹ there is often only one judge willing to conduct a particular accountability court, sometimes because other judges in the jurisdiction agree to create the accountability court with the understanding that the judge wishing to create it will handle all of its cases from start to finish.³² Hence, operational convenience, and not any ostensible rehabilitative benefit, best explains why some accountability courts chill, or arguably bar, disqualification.³³ Third, some judges express that for accountability court to be effective, the defendant should know she will, without possibility of disqualification, have to face the same judge she disappointed. Certainly, keeping the same judge assigned to a defendant throughout the program is a benefit, but not necessarily once the defendant is to be terminated or sentenced. There is no evidence that the same judge bearing the sword of Damocles makes accountability courts more effective. As discussed below, no law authorizes a judge to establish a policy requiring waiver of her own disqualification by balancing theoretical benefit to a party against that judge’s own loss of the appearance of impartiality.

The *Waiver of Right to Assert Specified Grounds as Basis for Motion of Recusal* (prospective waiver of disqualification) appears to have spread from Florida to Georgia and other states.³⁴ The exact extent of the prospective waiver of disqualification’s use is unknown, but a survey conducted by the authors revealed that nearly half of the responding adult drug courts in Georgia require each defendant to execute such a waiver.³⁵ The authors surveyed all 32 adult felony drug courts then listed on Georgia’s official accountability court website. Out of the 12 respondents, five drug courts provided the authors with drug court contracts that included the prospective waiver of disqualification. Because the prospective waiver of disqualification is mentioned in Georgia case law,³⁶ Georgia is cited by a nationally published drug court benchmark,³⁷ and at least one American Law Reports annotation, for the proposition that a drug court may require a waiver of disqualification rights.³⁸ The proposed comment to Rule 2.11 would discourage this practice before it spreads further.

Included herein are copies of actual Georgia accountability court prospective waivers of disqualification, virtually

identical to, and believed adopted from, those used in some Florida drug courts. Notably, the prospective waiver of disqualification has no provision for when a defendant can still move for disqualification, an omission apparently intended to chill the filing of a motion to disqualify on any basis, foreseeable or unforeseeable.

III. The CJC Prohibits These Prospective Waivers of Disqualification

There is no legal authority for systematically avoiding Rule 2.11.⁴¹ Rule 2.11 requires disqualification whenever “the judge’s impartiality might reasonably be questioned” including several listed situations.⁴² Remarkably, the prospective waiver of disqualification purports to prevent disqualification exactly when disqualification is required under Rule 2.11(A). The first of these situations occurs when “the judge has a personal bias or prejudice concerning a party ... or personal knowledge of facts that are in dispute in the proceeding.”⁴³ This is an objective standard.⁴⁴ Actual impropriety is not required.⁴⁵ Knowledge means “actual knowledge of the fact in question” and “may be inferred from circumstances.”⁴⁶ The “extrajudicial source rule” provides the source of disqualifying bias must be extrajudicial, acquired outside judicial proceedings.⁴⁷

There are at least four legal reasons why the prospective waiver of disqualification is unauthorized by law. First, a waiver of disqualification can only be based on known, existing facts, not on facts that are both unknown and have not yet occurred. Hence, a prospective waiver of disqualification is infirm precisely because it is prospective. Foreseeability of a relationship developing between an accountability court judge and a defendant does not legally authorize the judge to require prospective waiver of disqualification. Second, the prospective waiver of disqualification is faulty for not distinguishing between proper judicial knowledge and extrajudicial knowledge or ex parte contact. Third, the prospective waiver of disqualification is invalid because, as the forms show, they are not signed by the prosecutor and, therefore, lack the mutuality required under law for a waiver of disqualification. Fourth, the prospective waiver of disqualification is invalid because, by its terms, judges are “using the power of their office to coerce” the

WAIVER OF RIGHT TO ASSERT SPECIFIED GROUNDS AS A BASIS FOR MOTION OF RECUSAL³⁹

The drug court participant and his/her counsel acknowledge that as consideration for acceptance and/or continued participation in the drug court program:

1. That the above-styled case will be assigned to the drug court division of superior court before the Honorable [omitted] or his/her designee; and
2. That should drug court participant fail to successfully complete the drug court program and be terminated from said program, that the above-styled case will remain assigned before Judge [omitted].
3. Understanding that the assignment of this case is to Judge [omitted] throughout all proceedings until ultimate disposition of the case, irrespective of defendant’s success or failure in completing the drug court program, the drug court participant hereby waives his/her right to assert as a basis for a motion to recuse the sitting judge:
 - a. That the *judge’s personal involvement with the drug court participant* during his/her participation in the drug court program;
 - b. That *judge’s knowledge, both personal and otherwise*, of defendant’s compliance or noncompliance with the requirements of the drug court program; or
 - c. That judge’s decision to terminate the drug court participant from the drug court program on the basis of his/her failure to comply with such requirements.

Defendant hereby freely, voluntarily and knowingly waives the right to assert the foregoing as grounds for a motion to recuse and acknowledges that he/she does so having consulted with counsel.

This the _____ day of _____, _____.

Defendant/Participant

Attorney for the Defendant

IN THE _____ COURT OF [omitted]
JUDICIAL CIRCUIT STATE OF GEORGIA⁴⁰

STATE OF GEORGIA)		CASE NO. _____
)		
)		
vs)		CHARGE(s): _____
)		
)		_____
_____)		
Defendant)		_____

**WAIVER OF RIGHT TO ASSERT SPECIFIED[sic]
AS A BASIS FOR MOTION OF RECUSAL**

The defendant and his/her counsel acknowledge that as consideration for acceptance and/or continued participation in the Mental Health Court program:

1. That the above-styled case will be assigned to the Mental Health Court before the Honorable [omitted].
2. That should defendant fail to successfully complete the Mental Health Court program and be terminated from said program, that the above-styled case will remain assigned before Judge [omitted].

Understanding that the assignment of this case is to Judge [omitted] throughout all proceedings until ultimate disposition of the case, irrespective of defendant's success or failure in completing the Mental Health Court program, the defendant hereby waives his/her right to assert as a basis for a motion to recuse the sitting judge, the following grounds:

1. The *judge's personal involvement with the defendant* during his/her participation in the Mental Health Court program;
2. The *judge's knowledge, both personal and otherwise, of defendant's compliance or noncompliance with the requirements of the Mental Health Court program; or*
3. That judge's decision to terminate the defendant from the Mental Health Court program on the basis of his/her failure to comply with such requirements.

Defendant hereby freely, voluntarily and knowingly waives the right to assert the foregoing as grounds for a motion to recuse and acknowledges that he/she does so having consulted with counsel.

This the _____ day of _____, _____.

Defendant/Participant
Rev. 11-03-09

Attorney for the Defendant

apparent personal benefit of exemption from ethical duty as "consideration" for acceptance into accountability court.⁴⁸

No law allows accountability court judges to be less accountable than other judges. Use of such a prospective waiver of disqualification chills the defendant's right to seek disqualification on factually valid lawful grounds. This predictably may bring the judiciary into disrepute because judges are not disqualified despite good cause. Because the paramount duty of a judge is to follow the law, the use of prospective waivers of disqualification should be revisited and discontinued.⁴⁹

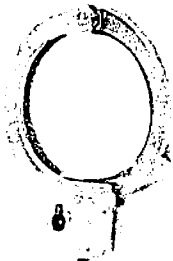
A. The Prospective Waiver of Disqualification Is Improper Because It Is Prospective

A waiver when impartiality might reasonably be questioned may only be accepted if "it is preceded by a full disclosure on the record of the basis for disqualification."⁵⁰ It is well settled that disqualification cannot be waived "if a party neither knew nor should have known" of the facts authorizing disqualification.⁵¹ Rule 2.11(C) does not authorize a judge to procure a prospective waiver of disqualification as a condition to execution of judicial duties or admission to an accountability court.⁵² Rule 2.11(C) provides a remittal procedure for known existing facts that gives "the parties an opportunity to proceed without delay if they wish to waive the disqualification" by Rule 2.11(A).⁵³ Rule 2.11(C) reads in its entirety:

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.⁵⁴

Therefore, remittal is allowed only for known, existing facts, so remittal may fairly be called retrospective. The U.S. Court of Appeals for the Eleventh

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Circuit noted the well-settled cautious attitude towards disqualification waivers based even on known, existing facts: “While it is thus permissible for a judge to accept a waiver of recusal, we believe this option should be limited to marginal cases and should be exercised with the utmost restraint.”⁵⁵

Therefore, any valid waiver of disqualification must be retrospective, never prospective, because the judge cannot possibly “disclose on the record” facts that have not yet occurred.⁵⁶ “A waiver [is] effective where the judge discloses information that is sufficient to put counsel on notice of the basis upon which the judge’s impartiality may be questioned.”⁵⁷

B. The Prospective Waiver of Disqualification Is Improper Because It Purports to Waive Bias From Extrajudicial Knowledge

The prospective waiver of disqualification provides:

[T]he drug court participant hereby waives his/her right to assert as a basis for a motion to recuse the sitting judge ... the

*judge’s personal involvement with the drug court participant during his/her participation in the drug court program [and] [t]hat judge’s knowledge, both personal and otherwise, of defendant’s compliance or noncompliance with the requirements of the drug court program. ...*⁵⁸

otherwise, of [the] defendant’s compliance or noncompliance with the requirements of the drug court program.”⁵⁹ The law does not allow disqualification for properly acquired judicial knowledge gained from the proceedings, so the prospective waiver of disqualification for future personal knowledge is necessarily for extrajudicial knowledge.⁶⁰ Accountability court team meetings are necessary to an accountability court’s

A prospective waiver of disqualification chills the defendant’s right to seek disqualification on factually valid lawful grounds.

The prospective waiver of disqualification’s broad phrasing purports to waive all “personal involvement,” not just proper judicial involvement as an accountability court judge; even extrajudicial personal involvement appears to be waived. The prospective waiver further attempts to waive the basis of the “judge’s knowledge, both personal and

operation, so to the extent this is ex parte, an advance waiver of such communications is proper and the information acquired is thus proper judicial knowledge. But, the prospective waiver of disqualification is not tailored to this narrow purpose and is impermissibly much broader. There is no basis in law for requiring prospective waiver of dis-

qualification rights for a judge's yet unknown and undisclosed future acquisition of extrajudicial knowledge.

For example, if a DUI accountability court judge allegedly sees a DUI accountability court defendant intoxicated in a public place, then the judge would have extrajudicial personal knowledge of the participant's noncompliance with the requirements of the accountability court program. Therefore, the judge would have "personal knowledge of disputed evidentiary facts" at the accountability court termination proceeding and would be subject to disqualification under Rule 2.11(A).⁶¹ Even a judge requiring and relying upon a prospective waiver of disqualification must offer a Rule 2.11(C) remittal of disqualification for this truly extrajudicial knowledge. But a judge using the prospective waiver of disqualification may incorrectly believe that a Rule 2.11(C) remittal of disqualification is unnecessary in such a situation, tending to bring the judiciary into disrepute for the nondisclosure.

The lines can easily blur. Misconduct can result from the judge's nontraditional rehabilitative role in accountability courts. For example, during a lunch recess, a treatment court

judge in New York took one of his participants alone to a park 16 miles away from the courthouse to discuss the participant's "reasons for his continuing substance abuse."⁶² New York's Commission on Judicial Conduct censured the judge,⁶³ holding:

Even in Treatment Court, a judge is not a social worker or therapist, but must maintain the role of a neutral and detached arbiter who at all times remains cloaked figuratively with his black robe of office devolving upon him standards of conduct more stringent than those acceptable for others. [The judge]'s behavior showed a serious misunderstanding of the role of a judge.⁶⁴

In situations like the one above, when the judge is clearly acting outside her proper role by having extrajudicial contact, the judge may believe the contact is proper due to the prospective waiver of disqualification. The defendant and her counsel may mistakenly believe they have no right to disqualify the judge because of that same prospective waiver of disqualification. This illustrates the danger of a prospective waiver of disqualification.

C. The Prospective Waiver of Disqualification Is Improper Because It Is Unilateral, Purporting to Waive Only the Defendant's Right to Move For Disqualification

Remarkably, the waiver form is designed to be signed only by the accountability court participant and her defense attorney, not the prosecutor.⁶⁵ This means, for example, the defendant is chilled from moving to disqualify a truly biased judge, but the prosecutor remains free to move to disqualify a biased judge. Rule 2.11(C) clearly requires all of the parties to agree for the waiver to be valid, hence a proper waiver would clearly also require the prosecutor's consent. "[D]isclosure and waiver requirements 'must be strictly construed.'"⁶⁶ There are no exceptions to the mutuality requirement for accountability courts.

Ironically, the systematic judicial requirement of a unilateral prospective waiver of disqualification is therefore not only invalid, but may itself be evidence of judicial bias in favor of the prosecution and therefore grounds for disqualification.

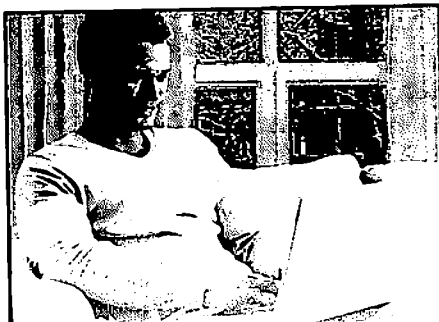
D. The Prospective Waiver of Disqualification Is Invalid Because, by Its Terms, Judges Are 'Using the Power of Their Office to Coerce' the Apparent Personal Benefit of Exemption From Ethical Duty as 'Consideration' for Acceptance Into Accountability Court

Model Code of Judicial Conduct "Rule 2.2 requires judges to uphold and apply the law and perform all duties of judicial office fairly and impartially. Judicial impartiality implies judicial objectivity and resides at the core of what Justice Kennedy ... has called the promise of neutrality."⁶⁷ "Beyond direct participation in the plea negotiations, judges may also violate Rule 2.2 by directly or indirectly using the power of their office to coerce a defendant to enter a guilty plea."⁶⁸ Logically, it follows that no condition of the guilty plea can be coerced by the judge, especially to obtain a benefit for the judge. By the waiver's terms as an adhesion contract, the defendant is buying the exercise of accountability court jurisdiction "as consideration for acceptance and/or continued participation in the Mental Health Court program."⁶⁹

The improper appearance is certainly that the waiver form directly benefits the judge, casting a coercive pallor on the promise of judicial neutrality. From the defendant's point of view, the prospective waiver of disqualification looks like the judge putting the judge's self-interest first in rationing the enticing unique benefits of accountability court. Instead of neutrality, as the "Mental Health Court" waiver of recusal form shows, the defendant with mental health issues is met at the mental health accountability courthouse door with a self-protective judicial demand for waiver of neutrality as the ante for buying the exercise of mental health court jurisdiction to allow diminished punishment, best available rehabilitation, and expungement⁷⁰ of criminal history, unique to accountability courts. The lesson of the waiver form is that the first step to recovery and rehabilitation is trading benefits with the judge.⁷¹

IV. The Borrowed Legitimacy of Accountability Courts Requires Strict Adherence to the CJC

Although accountability courts are



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given license to innovate, the ends do not justify disregarding the CJC as the means. Exactly to the contrary, even truer in accountability courts than in other courts, every effort must be made to maintain "the appearance of justice"⁷² because accountability courts operate on "borrowed legitimacy."⁷³ Accountability courts operate on borrowed legitimacy because many due process safeguards are necessarily waived so the judge can be an effective member of the treatment team, outside the normal judicial role.⁷⁴ The differences between accountability courts and conventional courts endanger the legitimacy of both:

The legitimacy of a traditional court rests on the perception, whether real or not, that the court is neutral and disinterested in the outcome. The problem-solving courts depend on the moral legitimacy of the traditional courts for the authority to coerce individual treatments. The problem-solving courts, however, are not neutral. Rather than creating a space between the litigants and the court, as in the traditional courts, problem-solving courts seek a complete immersion into the case. As a part of the treatment team, the court is decidedly not disinterested or neutral.

...

One of the precepts of problem-solving courts is that the judge should be an active participant. Indeed, the courts depend on the authority of the judge to promote the treatment progress. The judge cannot be said to be disinterested in an outcome: clearly, the court, as part of the treatment team, has a stake in the success of the treatment process. These concerns are not merely theoretical. ...

As this lack of neutrality becomes transparent, the result will be a loss of legitimacy for the problem-solving courts, and for traditional courts as well. The perception that all courts act neutrally, and without an interest for any particular outcome, is crucial to the acceptance of the decision of the court by all parties. *Once that perception deteriorates, through experience with the problem-solving courts, the label of illegitimacy*

*will not be limited to the problem-solving courts, but could spill over to traditional courts as well.*⁷⁵

For accountability courts to survive and thrive, they must be perceived as legitimate. Careful adherence to the CJC is required to prevent the accountability court model from being brought into disrepute.

Defendants and their counsel should not be induced to believe they cannot move to disqualify. What is the effect on the public perception of accountability courts if a defendant had the right to disqualify the judge, but failed to do so because she believed the prospective waiver of disqualification was valid? Beyond the ethical issue, the use of prospective waivers of disqualification will likely create claims of ineffective assistance of counsel premised on defense counsel's failure to move to disqualify the trial judge.

The CJC's judicial canons embody centuries of experience in enhancing judicial legitimacy. The efficacy of accountability courts does not justify superseding the application of CJC Rule 2.11 disqualification. Accountability courts are still young — operating on borrowed legitimacy. The right to disqualify a judge whose impartiality is reasonably in question should not be chilled.⁷⁶ If any waiver is required for admission into an accountability court, the waiver may be only of the defendant's right to be present at the accountability court team meetings that include the judge,⁷⁷ and the waiver may also allow those team meetings to be off the record.⁷⁸ Such a waiver would make judicial knowledge acquired in team meetings proper judicial knowledge.⁷⁹ An accountability court judge must still avoid ex parte contact and extrajudicial knowledge just like any other judge.⁸⁰ Innovation in rehabilitation is laudable, but unauthorized innovation in judicial ethics unquestionably imperils judicial legitimacy.⁸¹

Notes

1. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2011) (emphasis added).

2. Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1499 (2004).

3. Louraine C. Arkfeld, *Ethics for the Problem-Solving Court Judge: The New ABA Model Code*, 28 JUST. SYS. J. 318 (2007) (emphasis added).

4. WEST HUDDLESTON & DOUGLAS B.

MARLOWE, NAT'L DRUG COURT INST., PAINTING THE PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 43 (2011).

5. See, e.g., O.C.G.A. § 15-1-15 (2012).

6. State v. Stewart, No. W2009-00980-CCA-R3-CD, 2010 WL 3293920, at *6 (Tenn. Crim. App. Aug. 18, 2010).

7. *Id.* at *5.

8. *Id.*

9. NAT'L ASSOC. OF DRUG COURT PROF'LS, DEFINING DRUG COURTS: THE KEY COMPONENTS 15 (1997), available at <https://www.ncjrs.gov/pdffiles1/bja/205621.pdf>.

10. *Id.* at 7.

11. JUDICIAL COUNCIL OF GA., STANDARDS FOR ACCOUNTABILITY COURTS 3, § 1.2 (2012), available at http://georgiacourts.gov/files/JC_Standards%20for%20Accountability%20Court.pdf.

12. NAT'L ASSOC. OF DRUG COURT PROF'LS, *supra* note 9, at 15; see also JUDICIAL COUNCIL OF GA., *supra* note 11, at 12.

13. See NAT'L ASSOC. OF DRUG COURT PROF'LS, *supra* note 12.

14. See *Wilkinson v. State*, 641 S.E.2d 189, 190 (Ga. Ct. App. 2006).

15. *Id.* scope, § 2.

16. *In re Johnson*, 1 So. 3d 425, 433 n.8 (La. 2009);

17. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2011) (emphasis added).

18. See Caroline S. Cooper, *Frequently Asked Questions Series: Sentencing Judges for Drug Court Participants Who Are Terminated*, BJA DRUG COURT CLEARINGHOUSE (July 31, 2006), <http://www1.spa.american.edu/justice/documents/2013.pdf>. The authors would like to thank Deborah Wood Smith from the National Center for State Courts for directing them to some informative sources. Using the responses from the BJA's Frequently Asked Questions Series, the authors compiled the data referred to in the main text that follows this endnote by attempting to infer the court's disqualification practice from the responses to the blog. This is an informal survey and merely used to show the divergent approaches nationally to judicial disqualification. The authors organized the data into a table, which is available upon request.

19. *State v. Rogers*, 170 P.3d 881, 886 (Idaho 2007) (finding that a drug court judge may preside over termination proceedings); *State v. Belyea*, 999 A.2d 1080, 1081 (N.H. 2010) (holding the defendant failed to establish that an objective, disinterested observer who was fully informed of the operation of the drug court program and the judge's "participation as a member of the drug court team generally and in this case specifically, would entertain significant doubt about [the judge's] ability to fairly and impartially judge the issues presented

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at the defendant's termination hearing"); see also *Ford v. Commonwealth*, Nos. 2008-CA-001990-MR, 20090CA-000889-MR, 2009-CA-000461-MR, 2010 WL 1729091, at *5 (Ky. Ct. App. Apr. 30, 2010); *In re M.W.*, 2012-Ohio-5075, at ¶ 38 (finding no evidence in the record that would have supported a motion to disqualify the judge in a parental rights proceeding based on the mere fact that the judge presided over the mother's drug court hearings); *Harpring v. Commonwealth*, No. 2004-CA-000898-MR, 2005 WL 1924728, at *2 (Ky. Ct. App. Aug. 12, 2005) ("We do not believe the fact that the same judge presided over [the defendant's] trial proceedings, drug court sessions, and probation revocation hearing necessarily violates the requirement for an unbiased judge, nor do we believe [the defendant] was denied due process."); *Tenn. Adv. Op. 11-01* (Mar. 23, 2011).

20. See, e.g., *Tenn. Adv. Op. 11-01* (Mar. 23, 2011) ("We conclude, therefore, that serving as a functioning member of the drug court team does not in and of itself require recusal of the judge in a revocation hearing. Rather, recusal is required only if the appearance of impartiality should surface in the face of a fair and honest 'objective standard' analysis by the judge predicated upon the specific facts developed in

each particular case.").

21. See *supra* note 18.

22. *Alexander v. State*, 48 P.3d 110, 115 (Okla. Crim. App. 2002).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *State v. Stewart*, No. W2009-00980-CCA-R3-CD, 2010 WL 3293920, at *10 (Tenn. Crim. App. Aug. 18, 2010). However, the right to disqualify the judge will be waived at the appellate level if the defendant does not raise the issue to the trial judge. See *State v. Black*, No. E2010-00924-CCA-R3-CD, 2011 WL 208075, at *5 (Tenn. Crim. App. Jan. 13, 2011).

28. *Casey, supra* note 2, at 1501. This article was referring to drug courts being created by innovative judges, *sua sponte*, without legislative authority. The authors believe that "proscribed limitations of the law," should instead read "prescribed limitations of the law," simply describing that judicial legitimacy is enhanced by legislative authority for the process.

29. Hon. Jeffrey S. Bagley, *Maintaining Judicial Independence in Drug Courts*, GA. B.J., June 2011, at 15, 19.

30. *Id.*

31. For example, Georgia approves the

operation of seven accountability courts in each judicial circuit. Personal communication with Lateefah Thomas, Accountability Court Program Manager, State of Georgia Administrative Office of the Courts (June 14, 2013). Some Georgia judicial circuits have only two superior court judges.

32. "[A]s innovative and creative institutions, these courts tend to draw the most charismatic of judges as early leaders." *Casey, supra* note 2, at 1491.

33. Some accountability court literature effusively lauds the benefits of the same judge terminating and sentencing unsuccessful program participants, but no law authorizes this theoretical unproven alleged benefit to trump CJC Rule 2.11.

34. See *Cooper, supra* note 18, at 5 (noting use of waiver entitled "Waiver of Right to Asset Specified Grounds as a Basis for Motion of Recusal" copied from an Escambia County, Florida, waiver).

35. In July 2012, Georgia's then 32 adult felony drug courts were surveyed by email. Five out of the 12 that responded currently used this prospective waiver of disqualification or substantially its equivalent. No accountability courts are specifically named because that is not this article's purpose. The authors have the utmost respect for the judges who have bravely pioneered into the uncharted territory of accountability courts.

36. *Wilkinson v. State*, 641 S.E.2d 189, 191 (Ga. Ct. App. 2006).

37. NAT'L DRUG COURT INST., *THE DRUG COURT JUDICIAL BENCHBOOK* §§ 8.7 n.93, 10.11 n.43 (Douglas B. Marlowe & William G. Meyer eds., 2011).

38. See Fern L. Kletter, Annotation, *Due Process Afforded in Drug Court Proceedings*, 78 A.L.R. 6TH 1, § 17 (2012).

39. See *supra* note 35 (emphasis added).

40. Internet address on file with the authors (emphasis added).

41. For an example of a state-law specific analysis of the prospective waiver of disqualification, see Appendix *infra*.

42. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2011).

43. *Id.* R. 2.11(A)(1).

44. *Mayor of Savannah v. Batson-Cook Co.*, No. S11G1814, 2012 WL 1909351, at *5 (Ga. May 29, 2012).

45. *Birt v. State*, 350 S.E.2d 241, 243 (Ga. 1986).

46. *Id.* terminology.

47. See *Cranford v. State*, 621 S.E.2d 470, 472 (Ga. Ct. App. 2005) ("[T]he alleged bias must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge

Continued on page 61

WAIVERS IN PROBLEM-SOLVING COURTS

Continued from page 42

learned from his participation in the case.” (quoting *Gillis v. City of Waycross*, 543 S.E.2d 423, 425 (Ga. Ct. App. 2000)).

48. ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 104 (2d ed. 2011) (citing *In re Keith*, 3 Ill. Cts. Comm’n 39, 61–63 (1994)).

49. “[C]ustom is not a mitigating factor or a defense in judicial disciplinary cases.” *In re Johnson*, 1 So. 3d 425, 434 (La. 2009).

50. 28 U.S.C. § 455(e) (2006).

51. ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 224 (2d ed. 2011) (citing *Aetna Cas. & Sur. Co. v. Berry*, 669 So. 2d 56 (Miss. 1996)).

52. *See id.*

53. GA. CODE OF JUDICIAL CONDUCT Canon 3(F) cmt.; *see also* MODEL CODE OF JUDICIAL CONDUCT R. 2.11(C) (2011).

54. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(C).

55. *United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989).

56. *Id.*; *see also* *State v. Stilson*, Nos. 22896-7-III, 22899-1-III, 2005 WL 767417 (Wash. Ct. App. 2005) (finding that “waiver [did] not apply since [the defendant] did not learn of the court’s suspected bias until sentencing was in progress”).

57. *Superior Pontiac Buick GMC, Inc. v. Nissan N. Am., Inc.*, No. 08–10642, 2012 WL 1891003 (E.D. Mich. May 24, 2012) (citing *United States v. Conforte*, 624 F.2d 869, 878–83 (9th Cir. 1980)).

58. *See supra* note 35 (emphasis added).

59. *See supra* text accompanying note 39, at § 3(b).

60. *See Cranford v. State*, 621 S.E.2d 470, 472 (Ga. Ct. App. 2005).

61. At a termination proceeding, evidence of noncompliance is at issue. Therefore, if the participant does not admit to being intoxicated at the public place, then the judge has knowledge of disputed evidentiary facts because the participant will be urging that he or she was compliant with the drug court program to avoid termination.

62. *In re Tarantino*, 2012 Annual Report 197, 202 paras. 21, 22 (N.Y. Comm’n Jud. Conduct Mar. 28, 2011).

63. *Id.* at 205.

64. *Id.* at 204.

65. *See supra* text accompanying note 39.

66. RECUSAL: ANALYSIS OF CASE LAW UNDER 28 U.S.C. §§ 455 & 144, FED. JUST. CTR. 42 (2002) (quoting *Barksdale v. Emerick*, 853 F.2d 1359, 1361 (6th Cir. 1988); *accord* *United States v. Murphy*, 768 F.2d 1518, 1538–39 (7th Cir. 1985)).

67. ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 93 (2d ed. 2011) (alteration in original) (internal quotation marks omitted) (quoting Donald L. Burnett, *A Cancer on the Republic: A Critical Appraisal of State Courts and the Challenge to Judicial Selection*, 34 *FORDHAM URB. L. J.* 265 (2007)).

68. ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 104 (2d ed. 2011) (citing *In re Keith*, 3 Ill. Cts. Comm’n 39, 61–63 (1994)).

69. *See* language in sample waiver on page 38 of this article.

70. *See, e.g.*, O.C.G.A. § 15-1-15(b)(2) (2012); *id.* § 35-3-37(b)(1) (2012).

71. In addition, “[a] judge may violate Rule 2.2 by participating in or attempting to participate in the process of negotiating a plea in a criminal case.” ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 104 (2d ed. 2011) (citing *In re Cox*, 553 A.2d 1255 (Me. 1989)). The judge is patently indirectly participating in the plea process by requiring “consideration” of prospective waiver of the judge’s own disqualification.

72. *Offut v. United States*, 348 U.S. 11, 14 (1954) (finding that “justice must satisfy the appearance of justice”).

73. *Casey, supra* note 2, at 1503.

74. *See, e.g.*, JUDICIAL COUNCIL OF GA., *supra* note 11, at 5, § 2.3.

75. *Casey, supra* note 2, at 1499 (emphasis added).

76. A respected benchbook “recommends that the drug court judge give the defendant the opportunity to recuse the judge, and the drug court judge should not be the judge conducting termination or probation revocation hearings, unless the participant and defense counsel specifically consent in writing to the judge hearing such matters.” NAT’L DRUG COURT INST., *supra* note 37, at 169.

77. A criminal defendant may waive her constitutional right to be present at any criminal proceeding including trial. *Smith v. State*, 669 S.E.2d 98, 108 (Ga. 2008).

78. Georgia law allows a defendant to prospectively waive take down by a court reporter in any misdemeanor proceeding. *See* O.C.G.A. § 5-6-41(b) (1995); *Johnson v. State*, 635 S.E.2d 267, 268 (Ga. Ct. App. 2006). Georgia law requires take down of felony trial and post-trial proceedings, but imposes no such statutory requirement in felony pretrial proceedings. O.C.G.A. § 17-8-5(a) (2008); *see also* *Primas v. State*, 501 S.E.2d 28, 30 (Ga. Ct. App. 1988). Therefore, a written waiver of drug court team meetings that included the judge would be authorized. Including these written waivers in the drug court contract, signed by the defendant and defense counsel, is the best practice. *See also* N.Y. Jud. Adv. Op. 01-52 (Apr. 18, 2002), *modified*, N.Y. Jud. Op. 04-88 (Mar. 10, 2005) (finding that judge may consider ex

parte communications made at drug court team meetings because defendant waived right to be present and acknowledged that judge could still consider communications if defense counsel was not present).

79. However, “given the potential significance of such material dealing with conduct of defendant during the pendency of the actions, and its possible consequences to the defendant’s liberty, ... it is important that the defendant’s attorney be given notice of and informed of the content and nature of the communications.” N.Y. Jud. Op. 04-88 (Mar. 10, 2005).

80. GA. UNIF. SUPER. CT. R. 4.1 (“Except as authorized by law or by rule, judges shall neither initiate nor consider ex parte communications by interested parties or their attorneys concerning a pending or impending proceeding.”).

81. Ultimately, following the *Alexander* rule in accountability courts — making disqualification automatic upon request if a termination and sentencing hearing or trial is pending — will likely evolve to be regarded as a best practice.

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